SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JASON A. PARK, on behalf of himself and all others similarly situated, Plaintiff, vs. CYTODYNE TECHNOLOGIES, INC., a New Jersey corporation; and DOES 1 through 100, inclusive, Defendants.	Case No.: GIC 768364 **TENTATIVE DECISION**

INTRODUCTION

Plaintiff Jason A. Park, on behalf of himself and all others similarly situated, filed a complaint against defendant Cytodyne Technologies, Inc., a New Jersey corporation. The complaint was certified as a class action.

Cytodyne markets and sells Xenadrine RFA-1, a dietary supplement commonly used as an aid in weight loss. The active ingredients in Xenadrine RFA-1 include ephedra and caffeine. Cytodyne advertises Xenadrine RFA-1 through magazine, television, and radio advertisements.

PLAINTIFF'S CAUSES OF ACTION

Plaintiff's complaint alleges three causes of action. The first claim alleges violations of the Consumer Legal Remedies Act ("CLRA"), California Civil Code sections 1750 et seq. Plaintiff's CLRA allegations couch plaintiff's false advertising allegations in the context of a CLRA claim. There is very little relevant case law addressing alleged violations of the CLRA. One court has considered claims of false advertising alleged to violate the CLRA as well as Business and Professions Code sections 17200 and 17500 et seq. and held that statements found to be not false or misleading under sections 17200 and 17500 et seq. are also not false representations under the CLRA. *Freeman v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995). Thus, the relevant legal standard and the burden of proof are set forth below in the discussion of plaintiff's claims under Business and Professions Code sections 17200 and 17500 et seq.

Plaintiff's second cause of action alleges false and misleading advertisements in violation of Business and Professions Code sections 17200 et seq. The third cause of action alleges false and misleading advertisements in violation of Business and Professions Code sections 17500 et seq. Plaintiff's factual allegations in these two causes of action are identical. Plaintiff does not allege any violations of sections 17200 et seq. other than the alleged false and misleading advertising that would also violate sections 17500 et seq. Further, cases addressing false advertising claims under both statutes have applied the same legal standard to both. See *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325. For these reasons, the causes of action under sections 17200 et seq. and sections 17500 et seq. will be discussed together.

BURDEN OF PROOF

1. Plaintiff Must Prove Statements Were False or Misleading and Made Without Reasonable Care.

Sections 17500 et seq. prohibit negligent or intentional dissemination of false or misleading advertising. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) ___ Cal. App. 4th ___; 133 Cal. Rptr. 2d 207.

Specifically, these statutes proscribe the making or dissemination before the public in California of any statement concerning the product that "is untrue or misleading, and which is known, or which by

the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500.

Thus, to maintain a claim of false or misleading advertising, a plaintiff must prove: (1) statements in the advertising are untrue or misleading, and (2) defendants knew, or by the exercise of reasonable care should have known, that the statements were untrue or misleading. *People v. Lynam*, (1967) 253 Cal. App. 2d 959, 965.

The plaintiff must carry both the burden of producing evidence and the burden of proving that each challenged advertising claim is false or misleading. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc., supra,* citing *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal. App. 4th 861, 878).

2. Plaintiff Must Prove Public Is "Likely To Be Deceived."

A plaintiff must prove that the public is "likely to be deceived" by the statements at issue in an advertisement.

> "Likely to deceive" implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

Lavie v. Proctor & Gamble Co. (2003) 105 Cal. App. 4th 496, 508 .

3. Advertisers Are Not Required to Produce Substantiation for their Advertising Claims.

Advertisers are not required to produce substantiation for their advertising claims in actions brought by private plaintiffs under Business and Professions Code sections 17200 et seq. and 17500 et seq. In *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc., supra,* the plaintiff argued that private plaintiffs are in the same position as the Attorney General and that the court should thus shift the burden of production and require advertisers to produce evidence substantiating the truth of their advertising claims. The Court of Appeal rejected that argument. The court held that private plaintiffs have the burden of producing evidence to prove their allegations that challenged advertising is false or misleading.

4. Statements Must Be Material To Be Actionable.

In order for an alleged false or misleading representation to be actionable, the statement at issue must be, among other things, material. Materiality is part of the "reasonable consumer" standard applied under the California unfair competition and false advertising statutes, in that reasonable consumers are not deceived by immaterial claims. A general discussion of the "reasonable consumer" standard, with citations to numerous relevant cases, is found in *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 504-512 (2003).

5. Nature of the Proof.

The law in this area was summarized in *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 331-32:

> Sections 17200 and 17500 are consumer protection statutes designed, in part, to protect the public by prohibiting false, unfair, misleading or deceptive advertising. (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal. 3d 197, 211 [197 Cal. Rptr. 783, 673 P.2d 660] (*Committee*).) "To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' [Citations.]" (*Ibid*.) Actual deception or confusion caused by misleading statements is not required. (*People v. Dollar Rent-A-Car Systems, Inc*. (1989) 211 Cal. App. 3d 119, 129 [259 Cal. Rptr. 191].) An "unfair" practice under section 17200 is one "whose harm to the victim outweighs its benefits." (*Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 839 [33 Cal. Rptr. 2d 438] (*Saunders*).) In a similar vein, the term "fraudulent" as used in the section "does not refer to the common law tort of fraud but only requires a showing members of the public ' "are likely to be deceived." ' [Citation.]" (*Ibid*.) No proof of direct harm from a defendant's unfair business practice need be shown, such that "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary." (*Committee, supra*, at p. 211.) Section 17200 has been interpreted broadly to bar all ongoing wrongful business activity, including misleading advertising, in whatever context it presents itself. (*People v. Dollar Rent-A-Car Systems, Inc., supra*, 211 Cal.App.3d at p.129.)
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> Thus, the statutes are meant to protect the public from a wide spectrum of improper conduct in advertising. They may be invoked where the advertising complained of is not actually false, but thought likely to mislead or deceive, or is in fact false. By their breadth, the statutes encompass not only those advertisements which have deceived or misled *because* they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. We reiterate the point made in *Saunders*, that the concept encompassed in the phrase "likely to be deceived" has no relationship to the concept of common law fraud, which is also sometimes referred to as deception. A fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under section 17200 or 17500. A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections.

6. What Type of Evidence is Required to Establish the Advertisements Are Misleading.

Defendants argue that claims brought under Business and Professions Code sections 17200 and 17500 and the Consumer Legal Remedies Act, Civil Code section 1750, require plaintiff to demonstrate through consumer survey evidence that each challenged advertising claim did in fact mislead consumers.

Case law is clear that the proper standard to determine whether a claim is misleading is the "reasonable consumer test." *Lavie v. Procter & Gamble Co.* (2003) 105 Cal. App. 4th 496; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267. The *Lavie* court rejected a broader "least sophisticated consumer" test proposed by the Attorney General. In so holding, the court did not specifically indicate what evidence was required in order to establish that an advertisement was misleading under the "reasonable consumer test." The issue framed for review was whether the trial court had "employed the wrong methodology in determining what messages were conveyed by the commercial, *relying upon its own intuition* rather than viewing the ads from the vantage point of a reasonable consumer." In upholding the trial court's conclusion that the commercials for Aleve were not likely to mislead, the Court of Appeal seemingly approved the trial court's intuition. *Lavie* is not dispositive as to what type of evidence is necessary to show that an advertisement was misleading because the portion of the opinion discussing the particular evidence before the trial court was not certified for publication.

Defendant relies on federal court opinions that require "consumer survey" evidence. In *Johnson & Johnson – Merck Consumer Pharmaceuticals Co. v. SmithKline Beecham Corp.* (2nd Cir. 1992) 960 F.2d 294, the Second Circuit held that where a plaintiff's theory of recovery is premised upon a claim of implied falsehood, a plaintiff must demonstrate, *by extrinsic evidence*, that the challenged advertisements tend to mislead or confuse consumers. "It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive." Rather, the Court held that the question is: "What does the person to whom the advertisement is addressed find to be the message?" According to the Second Circuit, the success of a plaintiff's implied falsity claim *usually* turns on the persuasiveness of a consumer survey.

In *Haskell v. Time, Inc.* (E.D. Cal. 1997) 965 F.Supp. 1398, the Court held that anecdotal evidence alone is insufficient to prove that the public is likely to be misled. Relying on *Johnson & Johnson*, the Court held that to prevail, plaintiff must demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead consumers. In *Haskell*, plaintiff presented evidence of "deception" regarding a sweepstakes in the form of declarations of a few sweepstakes customers and the declaration of one professor of rhetoric. After reviewing the alleged sweepstake statement and finding that plaintiff's interpretation was patently unreasonable, the court held the testimony of only a few customers and the expert was insufficient. The court reasoned that plaintiff needed consumer survey evidence indicating that a significant portion of the population has been misled by defendants' bulletins. "Indeed, plaintiff does not dispute that a majority of recipients neither respond to defendants bulletins nor purchase any of defendants' products. Plaintiff has therefore failed to prove that defendant's statements mislead the reasonable consumer." *Id.* at 1408.

Neither of these cases *require* the use of consumer surveys, nor have defendants cited a case with that proposition. *Johnson & Johnson* held that consumer surveys are a "usual" means of showing consumer deception. *Haskell* only held that "extrinsic evidence" was required.

The recent case, *Brockey v. Moore* (2003) 107 Cal. App. 4th 86, specifically disapproved of the methodology in *Haskell* and *Johnson & Johnson*. Like *Haskell*, the court in *Brockey* had "anecdotal evidence" of deception in the form of testimony from plaintiffs who were deceived. However, *Brockey* distinguished *Haskell* and other federal cases on the grounds that those cases involve "a very few persons claiming to be misled and do not hold that "anecdotal" evidence can never suffice." The court in *Brockey* found no California case required a consumer survey to establish an advertisement was misleading.

The court reasoned that the primary evidence in a false advertising case is the advertising itself. *Brockey* analogized the state unlawful advertising claims to federal cases involving the Federal Trade Commission's regulation of deceptive advertising. "The United States Supreme Court has rejected a claim that survey evidence was required . . . [in] regulation of deceptive advertising." citing *Federal Trade Com. v. Colgate-Palmolive Co.* (1965) 380 U.S. 374, 391-392 [13 L. Ed. 2d 904, 918, 85 S. Ct. 1035] and *Resort Car Rental System, Inc. v. Federal Trade Com.* (9th Cir. 1975) 518 F.2d 962, 964.

The court in *Resort Car* held there was no need to consider objections to consumer testimony because it "merely supported the inferences which can logically be drawn by scrutinizing the advertising alone."

The *Brockey* court also found an analogy with trade name disputes and cases construing California's prior unfair competition law (former Civil Code section 3369). In those cases, the courts acknowledged the "likelihood of confusion" between names was a factual question and "the comparison of the two names themselves may be adequate to establish the likelihood of confusion." Citing *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal. App. 3d 289, 309; *Hair v. McGuire* (1961) 188 Cal. App. 2d 348, 353.

Determining reasonableness is something the trier of fact -- in this case, the judge -- does in all types of cases. As indicated in *Brockey*, if "a person of ordinary intelligence could reasonably be deceived or confused, that is all that is required." The judge should not have to exclude himself or herself as a person of ordinary intelligence and a reasonable consumer.

Further, requiring consumer-survey-type evidence would seemingly contradict opinions which hold that proof of direct harm from a defendant's unfair business practice is not necessary for recovery. "The court may also order restitution without individualized proof of deception, reliance, and injury." *Committee on Children's Television v. General Foods Corp*. (1983) 35 Cal.3d 197, 211; *Day v. AT & T Corp.* (1998) 63 Cal. App. 4th 325, 332.

Based on the above, to establish that advertising is misleading under a reasonable consumer test should not require the use of consumer surveys. Considering that the advertisement speaks for itself, the judge is in a position to determine whether it is misleading, i.e. likely to deceive, under a "reasonable consumer" standard.

Therefore, this Court will analyze the advertisements and apply the reasonable consumer test. If the Court finds a claim to be misleading, it means members of the public are likely to be deceived, *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal.App.3d 119, 129 (1989), that the claim is material, in that it is likely to influence the purchasing decision, *Borden Inc. v. Kraft Inc.* (N.D. Ill. 1989) 224 U.S.P.Q. 811, 819, and the defendant knew or should have known, Bus. & Prof. Code § 17500. Before addressing the specific advertisements, the Court will discuss some of the areas of contention which bear on the specific claims in the advertisements.

THE PEAK WELLNESS STUDY

In May of 1999, defendant retained Peak Wellness Inc. to conduct a study on the effectiveness of Xenadrine RFA-1. Prior to this time, there had been no clinical tests of the Xenadrine RFA-1 product, and all of the studies in the advertisements referred to generic studies, i.e., studies of either ephedrine or ephedrine in combination with other compounds such as caffeine, aspirin or L-tyrosine.

The Peak Wellness study was conducted primarily by Douglas Kalman under the supervision of Dr. Carlon Colker. The study began with 30 overweight subjects. Sixteen were in the control group and 14 were in the placebo group. This was a double blind study.

By the end of the study, four in the control group had dropped out and one in the placebo group, leaving a total of 25 subjects who completed the test: 12 in the control group and 13 in the placebo group.

Dr. Qiuhu Shi did a biostatistical analysis of the results. The use of Dr. Shi's information and the results of the study were the subject of a great deal of testimony during the trial.

An abstract of the study, summarizing the results, was published in the *Obesity Research Journal* in January 2000. When the research paper was submitted, this journal refused to publish the paper, but it was published in the current *Therapeutic Research Journal* in April 2000.

The results of the study were that the experimental group lost 3.14 kilograms of weight versus a 2.05 kilogram loss for the placebo group. This was a marginally statistically significant difference according to Dr. Shi. These numbers were reached by comparing the 12 who completed the study in the control group with the 13 who completed the study in the placebo group. Using this same group comparison, Dr. Shi concluded that the study group lost 1.93 percent of body fat compared to 0.05 percent loss of body fat in the placebo group.

Table II in the Peak Wellness study used the beginning weight of all 30 subjects (including the five dropouts) to show a nine percent weight loss and a 16 percent body fat loss in the control group and a body fat loss of +1 percent by all 14 of the people who began the placebo group. Comparing -16

and +1 is the basis of the claim of 1700 percent greater fat loss. Dr. Shi's conclusion of 1.93 percent versus 0.05 percent is the basis of the claim of 3860 percent greater fat loss.

The fallacy of the percentages is exemplified by comparing -16 percent with +1 percent. There is no way those percentages can equal a 1700 percent difference, no matter what mathematical calculation one does. It is impossible to compare plus and minus and get a multiple. This fallacy is illustrated by the absurdity of these comparisons. The -16 percent is based on a fat loss of approximately 4 percent, or approximately 8 pounds. The 3860 percent is based upon a loss of approximately 4 1/4 pounds. Inasmuch as the loss of -16 percent of fat was a greater weight amount, it should not result in a lower percentage differential. This illustrates the misleading nature of the 1700 percent claim.

Defendant also misstates the placebo group in Exhibit 39.3, Tab 8, by stating that the subjects who took a placebo followed the same exercise program and actually gained body fat. This is not true since the gain in body fat is obtained only by using all 14 subjects. There is no information on the dropout from the placebo group. The subjects who completed the trial presumably continued to exercise, and that group had minimal fat loss.

The text correctly pointed out the relatively low weight losses when comparing the people who had finished the study. Table 2, which is the basis for the claim in the advertisements, compared all of the people who started. This increased the weight loss from about four percent to nine percent and also substantially increased the fat loss percentages.

Both sides have presented testimony regarding the “intent-to-treat” analysis. Defendant argues that the intent to treat means that you use all of the subjects in the baseline; i.e., all 30 subjects in the Peak Wellness test who began. This does not make sense to the Court. The intent-to-treat analysis would seem to require the researchers to attempt to follow up on the four dropouts and then use the data from all 16 in the original group. This was not done and there is no evidence that the Peak Wellness protocol was intent to treat. Since the data was not available from the four who dropped out, there is no justification for using all 16 when comparing to the placebo group. Similarly, using all 14 who started

in the placebo group is not justified. Therefore, the claim of 1700 percent fat loss difference and the nine percent weight loss difference are misleading.

Dr. Shi did not compare the 16 to the 14, but rather compared the 12 who finished to the 13 who finished. He had data on all 30, but did not attempt to compare them. It appears that Mr. Kalman went through and picked and chose the data which would give the most favorable results. Mr. Kalman admitted it would have been more accurate to have compared the 12 to 13, which gives a significantly lower reduction in weight for the study group and a significantly lower differential between the two groups.

The Court can only conclude that the money being paid to Dr. Colker caused him to influence Mr. Kalman and to try to create a study which justified the money being spent by defendant and which would ensure further work from defendant.

The question is whether defendant knew of this manipulation of the data. The defendant claims it relied on the information in the abstract, which it used in the advertisements. Only if the defendant did not ask any questions and blindly accepted the information in the abstract could the defendant justify using the percentages from the abstract. However, the defendant was the sponsor of the study. There were communications between Mr. Kalman and the defendant. The defendant should have, at a minimum, asked what the actual weight losses were, what the actual fat percent decreases were, and should have had sufficient information to know the misleading nature of the percentages shown in the abstract. Failure to investigate when the information was within the control of defendant satisfies the test of *People v. Forest E. Olson, Inc.* (1982) 137 Cal.App.3d 137. Even if the defendant did not have the information to know the abstract was misleading, the defendant certainly became aware of this information when the article was published and even before when the criticisms of the article were discussed with Mr. Kalman. Nevertheless, the defendant did not change the representations in the advertisements.

Since the TV-ad disclaimers said the average weight loss was 6.9 pounds, defendant had actual knowledge that the nine percent weight loss claim was a distortion of the results of the Peak Wellness study. Therefore, the statements of the nine percent decrease in weight are false and misleading and were known or should have been known by defendant to be so.

Defendant's position with respect to the 3860 percent or 38.6 times is that in addition to it being literally accurate, it was blessed by the judge in the Utah case brought by Basic Research. While the judge may have indicated that the math was accurate, the judge did not say it was appropriate to make this claim in advertisements, particularly in the context in which defendant used these numbers. If anything was blessed by Judge Kimball in Utah, it was the intent-to-treat analysis using the subjects including the dropouts. The defendant was well aware of the actual weight loss and actual fat loss and knew that 3860 percent was based on extremely low weight and fat losses. Therefore the defendant knew the misleading nature of the advertisements using 3860 percent or 38.6 times.

Defendant was aware that percentages can be misleading, especially when based on small amounts, from the comments on the article which were conveyed by Mr. Kalman to defendant and from Dr. Ziegenfuss in an e-mail, Exhibit 1311, discussing the EMU study which showed a loss of 3.19 pounds in the control group versus a half-pound gain in the placebo group. These numbers are comparable to the four and one-quarter pound fat loss that was the basis for the 3860 percent claim. Thus, defendant was advised that the small numbers were misleading yet continued to use the 3860 percent claim.

The use of the 1700 percent is similarly misleading in that weight loss of those who completed the study is 6.9 pounds in eight weeks compared to a four and one-half pound loss in the placebo group. Since the body fat of all 16 who began the study only went down by approximately four percent, actual body fat loss would be comparable to the weight loss. What is misleading is that the actual pounds of either weight or fat lost are substantially smaller than the claims for the before-and-after subjects or the amounts people are expected to lose as set forth in some of the advertisements. Therefore, both the 17 times and the 38.6 times claims are misleading because of the expectations raised in the minds of a reasonable consumer that these percentages apply to higher weight losses and fat losses than were demonstrated in the Peak Wellness study.

The Peak Wellness study does not justify any of the percentage comparison-between-group claims made in the advertisements. Any reasonable consumer reading these percentages would be misled.

THE EASTERN MICHIGAN UNIVERSITY (EMU) STUDY AND *XENADRINE XTREME MAGAZINE*

The only reference to the EMU study is on page 31 of the *Xenadrine Xtreme* magazine which was mailed toward the end of the class period. It says the "safety and efficacy" of Xenadrine RFA-1 was examined. This is false, as safety was not the purpose of the study. The only specific claim related to the study is "the results showed that the subjects ingesting Xenadrine RFA-1 lost significantly more weight (759%) and fat than those using the placebo without eating fewer calories or changing their carb-to-protein ratio. In addition, no negative effects were found on resting electrocardiograms or blood lipid profiles." The 759 percent calculation is based on a comparison of the weight lost in the Xenadrine RFA-1 group (minus 3.1 pounds) as compared to the placebo group (plus 0.44 pounds). The small total loss of weight in eight weeks, combined with the fallacy of comparing plus and minus numbers, makes the 759 percent claim misleading.

This claim appears in a magazine which is 50 pages long and this reference to the EMU study consists of two sentences on page 31. Further, the preceding paragraph refers to the Peak Wellness study and the 38.6 times greater fat loss claimed to have been achieved in the Peak Wellness study. The phrase 38.6 times or 3860 percent greater total fat loss appears at least five times in the *Xenadrine Xtreme* magazine. These claims, in the context of before-and-after testimonials of losing 63 pounds of body fat, 46 pounds of fat, and weight losses of 25 pounds and 45 pounds, along with letters indicating equally substantial if not greater weight losses, e.g. 100 pounds (twice), 96 pounds, and "90 pounds of pure fat," make the magazine misleading without the reference to the EMU study, as the reader would believe the 38.6 times relates to a weight loss or fat loss much greater than four pounds.

There was testimony regarding a press conference and a news release in which claims were made about the EMU study. There was no evidence that either the press conference or the news release was seen or heard by California consumers.

Therefore, notwithstanding the substantial amount of time and effort spent on the EMU study during the course of the trial, there is no need to discuss it further.

THE UTAH CASE

The parties have introduced into evidence opinions from the basic research case in Utah. The Court has reviewed those opinions, but neither of these rulings is binding on this Court. The Court notes that while there was some evidence received in the Utah case, the Utah court did not have the benefit of a six-week trial.

PUFFING

Defendant argues that the general claims are "puffery." "Puffery" is a vague or general statement on which no reasonable person would rely. To be actionable, there needs to be a "specific establishment claim." *Thompson Medical Co., Inc. v. Ciba-Geigy Corp.* (S.D.N.Y. 1986) 643 F. Supp. 1190.

The Court finds that the generalized claims in the advertisements such as "revolutionary new fat burning technology astounds the bodybuilding world" (Tab 1); "The most effective fat burning compound available" (Tab 4); and "The state of the art in fat loss technology" (Tab 8) are all puffing. Therefore, these claims and the many similar claims are not, by themselves, false or misleading.

Similarly, the claim of "pharmaceutical grade" or "pharmaceutical quality" made on the labels is puffing. Most of the experts could not even determine what this claim meant, and while Dr. Belch, in his survey, was able to obtain reactions from consumers, this claim does not appear to be false or misleading. Further, the testimony of Mel Rich supports this claim.

THE BEFORE-AND-AFTER ADVERTISEMENTS

Defendant claims to rely upon the affidavits of the individuals in the before-and-after advertisements to support the before-and-after claims. In the case of Mike Piacentino, this position makes no sense. Defendant was in possession of Exhibit 222.2, the "Candidate Progress Chart" for Michael Piacentino. This showed that on his starting the program, he weighed 229 pounds and had 21 percent body fat. That would give him a total of 48 pounds of body fat as represented. At week 10, which is the time period referred to in the advertisement, Mr. Piacentino weighed 195 pounds and had 8 percent body fat. That would give him 15 1/2 pounds of body fat. That meant that during this period, he would have lost 32 1/2 pounds of body fat, not 46 pounds of body fat as represented. Since the total weight loss was 34 pounds, he would have lost muscle mass, not gained it, to make up the difference in

the total weight loss between the fat loss of 32 1/2 pounds and the total weight loss of 34 pounds. Even using the week 12 reduction to 7 percent body fat, would give a total of about 13 1/2 pounds of body fat which would account for about 34 1/2 pounds of body fat loss which means, at most, Mr. Piacentino would have gained 1/2 pound of muscle, not the 12 pounds as indicated in the advertisement.

There is no way to reconcile the affidavit indicating 46 pounds of weight loss with either the calculations in Exhibit 1289.1 through 1289.13 (the documents from Physical Addiction) or Exhibit 222.2. Even the weight loss of 34 pounds is misleading because of the additional supplements being taken by Mr. Piacentino.

Since both Mr. Chinery and Mr. Conklin were aware of the inconsistent information, the claims in the advertisement regarding Mr. Piacintino's fat loss and muscle mass gain are evidence of defendant's willingness to stretch the truth to make its product appear to be more effective than it actually was. Both Mr. Chinery and Mr. Conklin used the identical wording that they were "confused" by the chart of the weight loss which showed only a 34-pound weight loss and the affidavit which showed a 46-pound weight loss. Yet the advertisements claim a fat loss of 46 pounds plus a 12-pound gain of muscle. Therefore, the defendant could not be relying on the affidavit which says a weight loss of 46 pounds. If the public does not know the difference between fat loss and weight loss as argued by the defendant, it would think from the advertisement that there had been a 46-pound weight loss. Since the defendant knew there had only been a 34-pound loss, the defendant knew this claim was false.

Evidence was introduced in the form of testimony from Mike Piacentino and documents from Physical Addiction that the weight losses attributable to Karen Curtis, Remy Feniello and Maria Korsgaard were not accurate. There is no evidence that defendant had this information. For each of these individuals defendant produced an affidavit attesting to accuracy (Exhibits 2118, 2120 and 596). There is no evidence that defendant knew that the affidavits were inaccurate. While there is some question about the notarization of the affidavits, as they are all notarized by the same notary, and none of the affidavits has a date by the notarization, this by itself is not enough to invalidate the affidavits. More importantly, since the before-and-after ads are misleading in the context of the exaggerated claims of fat loss, whether the before-and-after ads are accurate is not significant. The advertisements are misleading in that the typical consumer would expect dramatic weight losses based not only on the

before-and-after ad but on the percentage fat loss claim, which a reasonable consumer would think bears some relationship to the amount of weight lost as shown in the before-and-after ads. Since the actual amount of fat loss, which forms the basis for the percentage claims was so small, the advertisements are misleading.

In the case of Randy Martin his letter says his transformation was five months (Exhibit 1070) rather than the three months claimed in the advertisements. Defendant says Mr. Martin clarified the time later and said the weight was lost in three months. Since the weight loss by Mr. Martin is so great, there would be little reason to exaggerate the time it took, and therefore, the Court does not find the claims of weight loss by Randy Martin to be misleading. Compare, Christine Muller "45 pounds in 16 weeks" (Tab 13, Exhibit 19) with television Clip 5, Christine Muller "45 pounds in 12 weeks" with Clip 6, Christine Muller "41 pounds in 12 weeks."

CREDIBILITY

Before discussing the specific advertisements, it is necessary to discuss the credibility of the defendant's most important witness, Robert Chinery, the president of defendant. He worked for Pro Source and then left and started Cytodyne. He developed Xenadrine RFA-1. The Court does not find Mr. Chinery to be credible. Similarly the witnesses on defendant's payroll or retainer, *e.g.*, Kelly Conklin, Dr. Ziegenfuss and Dr. Colker, were not credible.

This finding is particularly important in evaluating what the defendant knew about the claims it was making. The Court finds the defendant was well aware that the claims made in the early ads were not accurate, as Mr. Chinery knew Xenadrine RFA-1 had not been the subject of the studies, knew only portions of the ingredients had been studied. and knew of the different dosages. Since Mr. Chinery was drafting the advertisements, it was his language that was designed to mislead consumers reading the advertisements by making a reader think that Xenadrine RFA-1 had been tested.

With respect to the Peak Wellness study, the Court finds Mr. Chinery was well informed of what was going on, and that he understood the actual amounts of weight and fat losses in the study. It appears that he probably encouraged Mr. Kalman to use the numbers that exaggerated the results.

With respect to the before-and-after studies, there is no specific evidence that Mr. Chinery was aware that the weight losses might have been exaggerated, other than Mike Piacentino. However, given

his experience in the field, he probably knew that the affidavits were not accurate. He knew about Mike Piacentino because he knew about the candidate weight-loss chart, and he should have known that Mr. Piacentino had previously posed for an advertisement for Pro Source as a well-conditioned body builder before he underwent his "transformation" using Xenadrine RFA-1 (See Exhibit 93.48).

Mr. Chinery's lack of candor can be seen throughout the trial.

Cytodyne has consistently failed to produce documents that could have explained things, pushed researchers to make studies come out favorable to them and paid money to the key people involved in providing information to them to ensure the information was favorable to them.

The discovery responses on the sales in California seem to have been designed to mislead the plaintiff. The defendant did not have any product complaints before 2000. There were no certificates of analysis. There were no assays. E-mails were deleted. Peak Wellness did not have its underlying documents. Mel Rich did not bring documents. Mr. Schiff did not bring documents, and some affidavits appear to be missing from the before-and-after subjects.

In addition, there are a series of mistakes, each favorable to defendant. There are mistakes in the p-values in the Peak Wellness study. There is a mistake on the website. There was a mistake in citing the wrong journal as support in one of the advertisements. There was a mistake in the weight-loss claims. There was not a patent pending.

Defendant's entire approach to marketing Xenadrine RFA-1 is epitomized by Dr. Armstrong at page 188, line 8 of his deposition when he said that what he was signing was "not a lie, per se."

SAFETY

A substantial amount of the trial was spent with experts on both sides testifying regarding the safety of Xenadrine RFA-1 or the safety of ephedrine and ephedrine caffeine products. The issue of safety is relevant to the express and implied claims of safety.

The Court first notes that while there should be substantial additional investigation into any adverse event reports and whether adverse reactions may be caused by Xenadrine RFA-1 or the other ephedra products on the market, it is not the role of this Court to determine whether or not this product should be banned. The plaintiffs do not seek to ban Xenadrine RFA-1 from market, nor would it be within the power of this Court pursuant to the provisions of California Business and Professions Code

section 17200 to make such an order. Any regulation is within the purview of the regulatory agencies and the legislature. The Court is ruling on the issue before it in this action: whether defendants have engaged in false and misleading advertising.

There have been numerous complaints submitted to defendant, to competitors of defendant, and to the Food & Drug Administration from consumers who claim they have suffered everything from transient events, such as palpitations or high blood pressure to strokes and heart attacks, some resulting in death. The Court allowed these adverse events into evidence, but only for the purpose of showing that the complaints had been made. There was no evidence that the complaints were truthful, i.e. that the events had in fact occurred, and no proof of any causal connection between taking Xenadrine RFA-1 or other ephedra products and the adverse event, although some of plaintiff's experts testified to a connection and pointed out the nature of ephedrine and caffeine is to constrict blood vessels and raise heart rate, which results in higher blood pressure, higher body temperature which, when combined with exercise, can result in stroke and heart attacks.

Even though there have been hundreds and maybe thousands of complaints regarding ephedra products, no evidence was introduced of the number of complaints including strokes and heart attacks that occur in the general population nor of the number of ephedra users. Thus, the ratio of complaints among ephedra users could not be compared to the general population. Recently, the *Rand Report* was published. While it was referred to by some of the experts, it was not allowed into evidence and the Court did not consider its conclusions.

It appears that defendant has gone out of its way to minimize the existence of any health risks that might exist. An example of this is in the *Xenadrine Xtreme* magazine. The thermogenics article by Dr. Ziegenfuss originally contained language on the last page under the heading, "Take Home Messages" that recommended using the product for only four to eight weeks and pointed out that one could expect certain side effects such as trembling, jitters, and elevated heart rate. These health warnings were edited out and do not appear in the article that was published in the *Xenadrine Xtreme* magazine. (Exhibit 281.7, Exhibit 2083, p.13).

In light of the questions as to the safety of ephedra products and the lack of safety studies, the Court finds that Tabs 1, 3, 4 and 8 are misleading because of the implied safety claims. The

testimonials from doctors in Tabs 1, 3, 4 and 8 imply Xenadrine RFA-1 is safe, as does the reference in Tabs 1 and 3 to "outperforming dangerous prescription products." This finding is in addition to the reasons discussed below that these advertisements are misleading. The safety statements in the *Xenadrine Xtreme* magazine are false in that the safety of Xenadrine RFA-1 had not been studied.

THE GENERIC STUDIES

The generic studies referred to in Tabs 1-6 and labels 1-3 do not support the claims made in the advertisements or the labels. References to these studies are misleading in that Xenadrine RFA-1 was not tested; the Xenadrine RFA-1 formula was not tested; the dosages in some studies are different; some studied rats, not humans; and the ingredients are not identical, e.g., some include aspirin (not salicin), some include only L-tyrosine, some tested only ephedrine; some tested ephedrine and caffeine, and some studied synthetic rather than botanical ephedrine. None of these differences are explained. Therefore, it is misleading to make it appear that Xenadrine RFA-1 was tested.

THE PRINT ADVERTISEMENTS

The Court will now discuss the effectiveness claims in individual advertisements.

TAB 1[1]

The very first ad, Tab 1, Exhibit No. 94.3, has several false and misleading statements. The ad says: "Shown in studies to increase the rate of fat loss by up to 300 percent!" Dr. Krieger, who did the study, testified this claim was false because the study did not measure fat loss but only weight loss. Moreover, the clear implication is that this weight loss relates to the product being advertised, Xenadrine RFA-1, particularly since it says, "New. Available without a prescription" in the corner above this phrase. The amounts of weight loss of the two models are 68 pounds in 10 weeks and 57 pounds in 9 weeks. The footnote in very small print says, "Joseph Isnardi (sic) and Nancy Latarroca achieved their extraordinary results using Xenadrine RFA-1 as their exclusive dietary supplement to their training program." A reasonable consumer would assume, even though these were extraordinary

[1] The Court has admitted the notebook containing the advertisements with Tabs 1-15 as Exhibit 2393.

results, that he or she might achieve results at least in the ballpark of the weight lost by these two models.

The phrase, "Patent Pending pharmaceutical grade formula," is false in that there was no patent pending. Whether this is a mistake or not, it certainly is a mistake in favor of defendant and given defendant's tendency throughout to exaggerate and always use the claim most favorable to it irrespective of the contraindications, the Court finds that phrase is false and misleading. It further adds to the misrepresentation as to whether Xenadrine RFA-1 was being tested. Why would this formula have a patent pending on it if it were not the formula that was being tested?

On the right-hand side of the advertisement, there are statements from doctors juxtaposed with statements such as "Shown in clinical studies to be 29% more effective.…" Without any other reference, it appears that it was Xenadrine RFA-1 that was shown to be more effective. The next statement is: "Unlike other weight loss products, Xenadrine RFA-1's thermogenic activity is not decreased the longer you use it. To the contrary, Xenadrine RFA-1's potent thermogenic fat burning effects actually increase," followed by a citation to Astrup. This refers to Xenadrine RFA-1's thermogenic activity, not the ingredients in Xenadrine RFA-1 and since Astrup tested only generic compounds, this statement is misleading. The next quote is "Xenadrine RFA-1's advanced thermogenic formula has been shown to actually spare lean muscle tissue. . . ." The citation again is misleading because it appears that Xenadrine RFA-1 was tested. Finally, the quote, "has been shown to actually prevent regaining of body fat normally associated with extreme weight loss," with a citation to Astrup must mean Xenadrine RFA-1 because there is no other reference. Thus, the first advertisement is misleading.

TAB 2

The second print advertisement, Tab 2, Exhibit 94.2, "Revolutionary new fat burning technology astounds the bodybuilding world," has quotes from bodybuilders which were not challenged during the litigation. In the right-hand column, the ad says:

> Since its introduction to the body building scene, Xenadrine RFA-1 has already established itself as the most effective of this emerging generation of sophisticated scientific weight loss tools! Xenadrine RFA-1’s potent thermogenic combination has

> been proven in more scientific studies than virtually any other formula (prescription or non-prescription). But Xenadrine RFA-1's powerful effects don't stop there-in a ground breaking study published in the prestigious International Journal of Obesity this potent thermogenic compound was actually shown to spare lean muscle tissue during intense weight loss cycles*, making Xenadrine RFA-1 the ultimate physique transformation tool!
>
> *Pasquali R, et al. Chronic beta receptors stimulation prevents nitrogen loss during semi-starvation in obese subjects. International Journal of Obesity 13 (supplement 1): (abstract).

The second advertisement is misleading in that a reasonable consumer would think Xenadrine RFA-1 was the product tested.

TAB 3

The third print advertisement, Tab 3, Exhibit 58, is virtually identical to the first ad except that the before-and-after substitutes Farah Fabricatore for Chris Sorrentino. Ms. Fabricatore lost 39 pounds in 28 days. This advertisement adds the phrase, "Lose up to 30 pounds in 30 days with the most powerful fat burning compound ever developed." It has all of the false and misleading claims of the first advertisement, but by adding the phrase, "30 pounds in 30 days," it is even more misleading.

TAB 4

In Tab 4, Exhibit 97, the truth of the portion of the advertisement with quotes from the doctors is unchallenged by the plaintiffs. Other than safety, the only portion which could be deemed misleading is the portion that talks about the scientific references. It says that the formula "is centered around a highly advanced, research proven thermogenic compound . . . ." It then says, "Xenadrine RFA-1's revolutionary thermogenic compound has been proven effective through a vast series of scientific studies which offer irrefutable proof to the extraordinary fat-burning/muscle sparing effects that are possible. No other thermogenic formula is backed by this number of published scientific studies!"

The clear implication of the second portion is that Xenadrine RFA-1 has been proven effective in scientific tests because no other thermogenic formula is backed by this number of tests. Further, since Xenadrine RFA-1 "is a revolutionary new approach to weight loss . . . based on the latest scientific research," any reasonable consumer would believe Xenadrine RFA-1 is the subject of the research mentioned in the list of scientific references. Therefore, TAB 4 is misleading.

TAB 5

The fifth advertisement, Tab 5, Exhibit 98.2, "Clinical studies confirm Xenadrine RFA-1's amazing fat-burning/muscle-sparing effects" is a two-page advertisement. The first page consists of before-and-after pictures of Randall Hanson stating that he lost "an extraordinary 63 pounds of body fat." The plaintiffs have not challenged any of the claims attributed to Mr. Hanson.

The next page, Exhibit 98.3, has four pictures on the top of bodybuilders with quotes attributed to them. The plaintiffs do not challenge this portion of the advertisement. The right-hand side consists of quotes from articles praising Xenadrine RFA-1 that are not challenged by plaintiff. Plaintiff challenges the portion on the left-hand column of the second page which states,

> Clinically Proven To "Burn Fat and Spare Muscle" Xenadrine RFA-1's advance "E/C" thermogenic combination has been the subject of numerous published clinical studies which offer undeniable proof of the extraordinary fat-burning/muscle sparing effects that are possible. In a recent study published in the prestigious *International Journal of Obesity*, this potent compound was shown to **increase the metabolic rate by over an astounding 600%!** This same journal also published a study showing the synthetic equivalent of this compound to **increase the total rate of fat-loss by over 300%!** And in yet another groundbreaking study, this potent compound was shown to help **prevent regaining of bodyfat** that is typically associated with extreme weight loss. This remarkable feat is actually made possible by way of Xenadrine RFA-1's amazing muscle sparing effects. In other words, preserving lean muscle tissue which is more 'metabolically active' than fat, the body is left with a permanently increased metabolism which in effect burns more calories and prevents new fat stores from forming.
>
> Another study published in the Journal of Pharmacology and Experimental Therapeutics found that by adding a specific thermogenic synergist, this combination may become over **54% more effective** than virtually any other thermogenic formula on the market." (All emphasis in original.)
>
> No other thermogenic combination is backed by this number of published clinical studies!

The heading "Clinically Proven," followed by references to clinical studies, is misleading in that the reader would think that it was Xenadrine RFA-1 that had been clinically proven, not merely some ingredient. Since none of the studies relate to Xenadrine RFA-1, all of the claims except for the 300 percent attributed to "the synthetic equivalent" are misleading (and Dr. Kreiger said only weight loss was studied.). There is a claim that by adding a specific thermogenic synergist, the "combination may

become over 45% more effective than virtually any other thermogenic formula on the market." The Maher study does not appear to support this claim. Further, Dr. Maher testified that his study did not support this conclusion. Even though Dr. Maher is probably biased against the defendant, the Court concludes that this portion relating to the Maher study is misleading.

OTHER ADVERTISERS

Before discussing the rest of defendant's advertisements, the Court will address the defendant's argument that its claims are not misleading in light of competitors' claims. Defendant has introduced two magazines for the Court to review to see the context in which readers see the Xenadrine RFA-1 ads. Exhibit 2376 is *Flex Magazine* from March 1998 and Exhibit 2377 is *Musclemag International* for February 2000. Both magazines consist of articles on bodybuilding and bodybuilding contests with seemingly an equal amount of advertising, primarily for supplements designed to add muscle or lose fat. The supplement business appears to be highly competitive. The defendant is correct in that consumers are bombarded with numerous advertisements and many claims of benefit for these products. A careful review of the advertisements, however, shows that the advertisements for Xenadrine RFA-1 make more specific claims than all but a couple of the other advertisements.

Even those advertisements with specific claims are far more candid than defendant's advertisements. For example, Hydroxycut makes a claim that you can burn 613 percent more fat, but in the text, it refers to "the highly touted ECA (Ephedrine, caffeine and aspirin) stack. This very stack is found in Hydroxycut and has been shown in recent clinical study to elicit a 613 percent greater rate of fat loss . . . ." (Exhibit 2377, p.3). The advertisement makes it clear that they are referring to the ingredients in Hydroxycut and not Hydroxycut itself. The Hydroxycut ad goes on to discuss the other ingredients in Hydroxycut and their added benefits, thus making it clear that Hydroxycut was not the subject of the study. Further, the advertisement refers to body fat loss in pounds and shows Group 1, the control group, lost 1.5 pounds whereas Group 2 "ECA stack as found in Hydroxycut" lost 9.2 pounds. Thus, the reader is able to see the actual weight loss being claimed.

By contrast, the advertisements for Xenadrine RFA-1 say, "Xenadrine RFA-1's revolutionary thermogenic compound has been proven effective through a vast series of scientific studies . . . no other

thermogenic formula is backed by this number of published scientific studies." Other claims are that Xenadrine RFA-1's advanced "E/C thermogenic combination has been the subject of numerous published clinical studies . . . in a recent study published in the prestigious International Journal of Obesity, this potent compound was shown to increase metabolic rate by over an astounding 600 percent."

As a result, any reasonable consumer would believe that Xenadrine RFA-1 has been tested in the scientific journals cited in the advertisements. Notwithstanding the word, "new," there is no way for a reasonable consumer to know that the product did not exist in the early '90s when some of the Journal articles were published. While a skilled grammarian or a skilled lawyer might find ambiguities in the language to show that it does not specifically say that Xenadrine RFA-1 was tested, that is not a reasonable conclusion for a reasonable consumer. Defendant's ads are written to leave the reader with the impression that it was Xenadrine RFA-1 that was tested. As is shown in the Hydroxycut ads, it is very simple to state that it is the ingredients, or at least some of the ingredients, that were tested in these studies. [2]

Contained in Exhibit 2377 is an advertisement for another Cytodyne product called Cytoplex." This advertisement says that Cytoplex contains a revolutionary compound called "Glucostatin-RFS" which is made up of a unique blend of substrates clinically proven to stimulate rapid and dramatic weight loss results, even without dieting." (Emphasis in original.) It also refers to an article in the International Journal of Obesity that found Glucostatin substrate number one actually increased the rate of weight loss by over 600 percent.

The Court finds this advertisement significant in two respects. First, it shows that defendant is capable of writing an advertisement that makes it clear that only the ingredients have been tested in scientific journals and not the product itself. Second, this appears to be one of the products that Randall Hanson provided to Mike Piacentino and possibly some of the other before-and-after subjects. Since this product is designed to increase weight loss, it would be extremely significant to a before-and-after subject who claims to have lost weight due to Xenadrine RFA-1. There is no way of knowing whether

[2] The Court is not finding the Hydroxycut advertisement to be accurate. It is only being used to show that the competitors are giving consumers more information about the studies.

the weight loss was due to Xenadrine RFA-1, to Cytoplex, to the other supplements, or to the incredible workouts done by Mr. Piacentino. The failure to disclose the consumption of other supplements is another reason the Mike Piacentino before-and-after advertisements are misleading. Therefore, the Court does not need to resolve the factual disputes regarding the photographs or the instructions given to Mr. Piacentino.

Since the supplements came from Cytodyne to Mr. Hanson, defendant cannot claim it did not know that these supplements were being provided to the before-and-after subjects. Defendant argues that Mr. Hanson was doing before-and-after studies on many different products and, therefore, defendant would not know what subject was getting which supplements that defendant provided to Mr. Hanson. The defendant should have known that Mr. Hanson was providing Mr. Piacentino with additional supplements, including supplements that were used as meal substitutes and therefore were used in losing weight. Had defendant done any investigation, such as simply asking Mr. Hanson (who was being paid by defendant as a consultant) who was receiving which supplements, it would have discovered this fact. See *People v. Forest E. Olsen* (1982) 137 Cal. App.3d 137.

TAB 6 and TAB 7

Exhibit 40, Tab 6, and Exhibit 2371, Tab 7, "Take Control," feature Nancy Latarocca losing 57 pounds in nine weeks. Tab 6 says, "It is no wonder Xenadrine RFA-1 is America's hottest new diet product. This revolutionary formula is centered around an advanced thermogenic compound shown in clinical studies to increase the metabolism and the total rate of fat loss by over 600 percent."

Tab 7, after an identical first sentence says, "In a groundbreaking double blind clinical trial, Xenadrine RFA-1's revolutionary thermogenic formula was shown to increase the rate of fat loss by a phenomenal 1700%!" (Emphasis in original.) Defendant used virtually the identical language in Tab 7 to refer to a study on Xenadrine RFA-1 as it used in Tab 6 to describe generic studies. This illustrates how the reference in Tab 6 is misleading, as anyone reading Tab 6 would think it was Xenadrine RFA-1 that was tested.

Tab 7 has a disclaimer, "While Nancy's results were extraordinary and go beyond what the average person may achieve, Xenadrine RFA-1 guarantees visible weight results in just 30 days or your

money back." However, there is no indication that Nancy's results are six or seven times greater than the results achieved in the Peak Wellness study. The 1700 percent claim is misleading and it is not saved by the disclaimer.

TAB 8

With respect to Tab 8, Exhibit 39, the middle page appears to be the first print ad to state in bold letters, as a headline, "Clinically proven to increase fat loss by an unprecedented 1700 percent." This advertisement contains both the 1700 percent greater fat-loss claim and the claim that the subjects reduced their total body weight by a remarkable nine percent. Both of these claims are misleading for the reasons discussed in the discussion of the Peak Wellness study.

The 1700-percent and nine-percent claims are also misleading in the context of the advertisement showing Mike Piacentino with a 46-pound loss, which is substantially greater than the weight loss in the Peak Wellness study. Further, as previously discussed, Mr. Piacentino's weight loss was not 46 pounds, nor did he drop 46 pounds of fat while "packing on a phenomenal 12 pounds of lean muscle mass." Further, any before-and-after advertisement with Mr. Piacentino is misleading because it does not disclose the use of other supplements and, in particular, meal-substitute supplements.

TAB 9

Tab 9, Exhibit 41, "You can see the difference" says Lisa Debonis lost 48 pounds in 12 weeks and although "Lisa's results are not typical," the statement that Xenadrine RFA-1 is "clinically proven to increase fat loss by an astounding seventeen times more than diet and exercise alone" (38.6 times in later ads) would indicate that the clinical proof should have been more substantial than the four pound fat loss in eight weeks that was basis of the 38.6 times claim or the 6.9 pound actual weight loss. Therefore, the advertisement is misleading.

TAB 10

Tab 10, Exhibit 52.5, features Maria Korsgaard and claims she lost an extraordinary 25 pounds in just three weeks. Even though her results are "not typical," the claim that Xenadrine RFA-1 is "clinically shown to increase fat loss by an astounding 38.6 times more than diet and exercise alone" is

misleading in this context since 25 pounds in three weeks is so dramatically higher than the 6.9 pounds in eight weeks that was shown in the Peak Wellness study.

TAB 11

Tab 11, Exhibit 51, featuring Karen Curtis (24 pounds in three weeks), Dave Muller (30 pounds in four weeks), and Maria Korsgaard (25 pounds in three weeks) refers to Xenadrine RFA-1 having been "clinically proven to increase fat loss by a phenomenal 17 times more than diet and exercise alone!" This claim of is followed immediately by, "Whether you need to lose 15 pounds or 100." Thus, anyone reading this ad would think that the 17-times loss bears some relation to weight losses of 15 pounds to 100 pounds or to the weight losses of thee models. Therefore, Tab 11 is misleading.

Tabs 9, 10, 11, 13, and 14 refer to weight loss in the before-and-after pictures and then make claims about fat loss. This appears to be an intentional attempt to exaggerate the claims. The weight loss percentage differences in the Peak Wellness test were substantially lower than the fat loss percentage differences between groups. The defendant has argued, and from these advertisements it appears the defendant believes, the public confuses fat loss with weight loss. Yet the advertisements use percentage fat loss claims to make it appear that weight loss also will be dramatically higher for those using Xenadrine RFA-1 compared to those using diet and exercise alone. This is one more example of how these advertisements are misleading.

TAB 12

The advertisement with Marshall Faulk, Tab 12, Exhibit 21, contains a claim of 3860 percent greater total fat loss which is misleading. However, the small amount of space devoted to this claim compared to the two pages of quotes, statistics and pictures of football stars makes this claim, in context, immaterial. It is doubtful if a reasonable consumer would be persuaded by the fat loss claim when there is no mention of any of the athletes losing specific amounts of weight or fat. The thrust of the advertisement is that Xenadrine RFA-1 will improve performance and make you look better, not

that you will lose a specific amount of weight or fat. Therefore, the fat loss claim is not material and this ad is not misleading.

TAB 13

Tab 13, Exhibit 67 contains the phrase, "Clinically proven to increase fat loss by a phenomenal 38.6 times more than diet and exercise alone" claim. (Emphasis in original.) As previously discussed, the 38.6 times by itself is misleading and in the context of before-and-after claims of losses of 54 pounds and 45 pounds, the 38.6 times claim is even more misleading. It is not saved by the phrase, "These results not typical" because the typical results are not shown.

The only time the actual results were shown was in the television commercials. There was a statement on the screen that the average weight loss was 6.9 pounds in 8 weeks. The Court is unable to find such a disclaimer in any of the print ads. The defendant was aware of the actual weight loss and knew it should be letting people know the average weight loss, yet the defendant did not use the actual average weight loss in any of the print ads where it would be more likely to be read than in the television ads.

TAB 14

The last advertisement, Tab No. 14, Exhibit 20, "What a difference," suffers from the same distortion as the other advertisements with the 38.6 times claim in the same advertisement with a claim of extraordinary weight losses, in this case, Remy Feniello's claim of losing 35 pounds in four weeks. Therefore this advertisement is also misleading.

TELEVISION COMMERCIALS

Each side has submitted transcriptions of the television advertisements that ran during the class period for Spots or Clips 2, 3, 4, 5, 6, 7, 10, 11 and 12. The plaintiff has also inserted clip 8. As the

Court is not certain when clip 8 ran, it is not included in this analysis. Spot or Clip 2 and Spot or Clip 12 are in Spanish.

As to Clips 3, 4, 5, 6, 7 10 and 11, each contains the claim of "Clinically proven to increase fat loss 38 times more than diet and exercise alone." As discussed in the analysis of the Peak Wellness study and the print ads, this claim by itself is misleading. This claim is even more misleading in these television advertisements, each of which contained a claim of substantial weight loss by the before-and-after models. Therefore, I find each of the English television commercials to be misleading.

In virtually unreadable small print on the bottom of the picture in the television advertisements, there is a statement that appears for a very brief time that the average weight loss was 6.9 pounds in 8 weeks. Further, anyone watching the television screen is so distracted by the men and women moving around, there is very little likelihood that any reasonable consumer would read the disclaimer. The defendant's statements that it was attempting to have visible disclaimers in the television ads are disingenuous and the disclaimers do not cure the misleading nature of the ads.

With respect to the Spanish version (Clip 2), the before-and-after claims are the same, but there are no disclaimers. Clip 2 contains a claim of 1700 percent greater loss of weight. This is misleading for the reasons discussed in the analysis of the Peak Wellness study and particularly in the context of the substantial weight losses in the before-and-after claims. Further, the 1700 percent, if it was accurate, only applies to fat loss, not weight loss.

Clips 2 and 3 use Mike Piacentino and are also misleading for the reasons discussed in the before-and-after section.

The final television clip or spot, Number 12, merely contains before-and-after claims, which are not by themselves misleading. Since there does not appear to be a specific percentage claim in this commercial, it is not misleading.

THE LABELS

The first Xenadrine RFA-1 label says "Xenadrine RFA-1's advanced new thermogenic formula represents the most sophisticated natural weight loss technology available. Its powerful thermogenic combination has been proven effective in numerous scientific studies." Exhibit 2006. Various articles are cited to support this. Clearly the import is that Xenadrine RFA-1 was tested. The second label, Exhibit 2007, made a slight change by adding "E/C" so the second sentence read, "Its powerful E/C thermogenic combination has been proven effective in numerous scientific studies." The listing of the generic studies has been deleted, but that does not cure the implication that Xenadrine RFA-1 had been tested. The same language is contained in label number 3, Exhibit 2004.

In analyzing the effect of the claims on the labels that it was Xenadrine RFA-1 that had been tested rather than merely a component, the survey done by Dr. Belch is helpful. I find that the Belch survey is a valid survey and the Court is not persuaded the criticisms of Dr. Strand.

In response to a question on labels 1, 2 and 3, the Belch survey showed that 56 percent of the people responding felt that Xenadrine RFA-1 had been proven effective in scientific studies (Exhibit 1305).

After the Peak Wellness study, the label was changed in the fall of 1999, to read, "Xenadrine RFA-1's advanced new thermogenic formula represents the most sophisticated natural weight loss technology available. Its powerful fat loss/muscle sparing effects have been documented through published clinical research." Exhibit 2005. Anyone comparing the language in the first three labels and the language in Exhibits 2005, 2009 and 10.5, the last three labels from fall 1999 through the end of the class period, would not be able to tell the difference. The language is virtually the same in the way it refers to what has been studied and tested and with reference back to Xenadrine RFA-1. While the last three labels are correct insofar as Xenadrine RFA-1 itself had been tested, the first three labels are not, and are misleading.

The last three labels are accurate in that Xenadrine RFA-1 was studied and fat loss and muscle sparing results were documented. No specific claims are made as to the results. Therefore, only the first three labels are misleading. The phrase "clinically proven" by itself is not misleading, nor is "thermogenic."

WARNINGS

The label has warnings for people with high blood pressure, and various other conditions. Even though consumers may not know they have the conditions, the warning advises them to consult a doctor if they are at risk or have a family history of the listed conditions in the warning. The Court finds that the warning on the last label is not misleading and no injunctive relief will be granted with respect to the label.

CLAIMS REGARDING THE CONTENT

Plaintiff has challenged the amount of the ingredients, their purity and specifically challenge the amount of salacin. Defendant produced Mr. Rich, the owner of Phoenix Laboratories who was a very persuasive witness, even though he did not bring documents. They also produced Mr. Schiff regarding the methods of verifying the amounts of the ingredients.

Plaintiff's experts came up with different results based on testing very small amounts of the product. Since plaintiff has the burden of proof of proving the claims to be false, the Court finds that plaintiff has not carried this burden.

REMEDY

A. The Consumer Legal Remedies Act

As set forth in Civil Code section 1782, the Consumer Legal Remedies Act (CLRA) requires that "thirty days or more" prior to filing a CLRA action "for damages" the consumer "shall" notify the potential defendant "of the particular alleged violations of Section 1770" and demand that he or she "correct, repair, replace or otherwise rectify" the goods or services alleged to be in violation of Section 1770.

The purpose of this notice is to provide and facilitate pre-complaint settlements of consumer actions wherever possible and to establish the limited period during which such settlement may be accomplished. *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41.

A party can amend a complaint for injunctive relief to allege damages. Subsection (d) provides: "Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), the consumer may amend his or her complaint without leave of court to include a

request for damages." Under this section, the amendment must be filed "not less than 30 days after commencement of the action for injunctive relief."

The notice requirements under the CLRA are to be "literally applied." *Outboard Marine Corp.* at 41. In Outboard, plaintiff argued "substantial compliance", in part, because of a letter sent several months after the complaint was filed. The court held that literal interpretation was the only means to comply with the purpose of facilitating pre-settlement negotiations. However, the court upheld the trial court's order overruling the demurrer. The court found that defendant effectively waived the notice provisions in a responsive letter whereby defendant indicated they construed the letter "as a preliminary notice and demand under California Civil Code 1782(a)." The court held that this statement constituted a waiver of a known right.

In the case at bar, the Complaint was filed on June 4, 2001. Paragraph 62 includes an allegation for damages. However, the letter giving notice was not sent until August 29, 2001. The letter giving notice did not comply with Civil Code section 1782, which requires the letter to be sent 30 days prior to the commencement of the action and a First Amended Complaint was never filed.

Defendant did not waive the notice requirement. The stipulation attached at Exhibit 7 merely indicates that plaintiff is seeking damages contained in Plaintiff's Statement of Damages dated October 29, 2001. There is no statement that plaintiff and defendant agree that any damages are allowable under the CLRA cause of action or that the damages in the stipulation are sought under the CLRA.

A demurrer was filed based, in part, on the failure to provide notice of the CLRA. However, the fact that Judge Hayes overruled the demurrer does not mean that the cause of action is proper. Judge Hayes made no finding that the notice was given or was not required. He only overruled the demurrer. The failure to state a cause of action is never waived. (Code Civ. Proc., § 430.80(a)).

Based on the above, plaintiff did not properly comply with the requirements in the CLRA for damages. Thus, damages are not awardable under the CLRA.

Even if the requirements of the CLRA had been met, the only evidence regarding damages is the amount the members of the class paid for the product. There is no evidence of the value of what the

class members received. In order to award damages, the Court would have to compare the difference between what the class members paid for the product and the value of the product they received. (Civ. Code, § 3343). The Court has no evidence upon which to make such a finding. Since there is no evidence that the product has no value, the plaintiff would not be entitled to damages under the CLRA.

B. Monetary Remedy

In fashioning a remedy under the unfair competition law, section 17203 does not mandate restitutionary or injunctive relief, rather it provides that the court "may make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition." Thus, the court has broad equitable power to create a remedy. *Cortez v. Purolator Airfiltration Products Co.* (2000) 23 Cal.4th 163, 179.

With this in mind, the Court will first discuss monetary remedies. Plaintiff argues that the class should recover the entire purchase price of Xenadrine RFA-1 from Cytodyne. Defendant argues that, at most, the plaintiff should only recover the "net profit."

The cases analyzing the unfair competition law (UCL) use the term "restitution" as well as "disgorgement" to describe the remedy available. A precise definition of terms is necessary.

Restitution has been defined as "compelling the UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property." *Korea Supply Company v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134, 1144-1145; citing *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127. True restitution recaptures the direct gain obtained by defendant in order to prevent unjust enrichment.

Disgorgement is a remedy that is broader than restitution. Disgorgement may be a synonym for restitution, but more often than not, disgorgement refers to a remedy for those who were not direct victims of an unfair practice. In this nonrestitutionary sense, disgorgement requires the surrender of all profits earned as a result of an unlawful practice regardless of whether those profits represent money

taken directly from persons who were victims of the unfair practice. *Korea Supply* at 1145. After *Korea Supply*, there is an issue as to whether disgorgement in this "nonrestitutionary" sense is allowable under the UCL.

Whether one is talking "true restitution" or "disgorgement," the measure is based upon defendant's benefit and not plaintiff's losses. The language of Business and Professions Code section 17203 contemplates that the money or interest was acquired by means of the practice. Both restitution and disgorgement involve a return of what defendant gained in the transaction. A party seeking restitution "must generally return any benefit" that it has received. Rest.2d, Contracts, § 376, com. a, § 384, com. a.) *California Federal Bank v. Matreyek* (1992) 8 Cal. App. 4th 125.

The purpose behind Business and Professions Code section 17200 is deterrence and not punishment. The purpose is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442. The court in *Korea Supply* discussed the purposes of the statute in terms of deterrence:

> The language of section 17203 is clear that the equitable powers of a court are to be used to "prevent" practices that constitute unfair competition and to "restore to any person in interest" any money or property acquired through unfair practices. (§ 17203.) While the "prevent" prong of section 17203 suggests that the Legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective. A court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices. The fact that the "restore" prong of section 17203 is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act.

There is no case cited by plaintiff where the consumer was entitled in restitution to more than the benefit to defendant. The recent case of Korea Supply emphasized that the common law understanding of restitution applies to Business and Professions Code section 17200. The issue in *Korea Supply* is different from this case because *Korea Supply* did not deal with the measurement of restitution per se. The court dealt with the issue of whether disgorgement was a proper remedy for an individual action, not a class action.

The court found that limiting the remedy to restitution was consistent with the policies behind the UCL to prevent practices that constitute unfair competition and to restore to any person in interest money or property acquired as a result of those practices. The court found no case that approved of nonrestitutionary disgorgement of profits as a remedy under the UCL and clarified the semantic confusion in these terms: "While prior cases discussing the UCL may have characterized some of the relief available as 'disgorgement', we were referring to the restitutionary form of disgorgement and not to the nonrestitutionary type."

Though limiting its holding to individual actions, the reasoning of the case suggests a broader holding that in any case under the UCL, nonrestitutionary disgorgement is unavailable. The Court implies that the only remedy available is restitution in the traditional sense. Restitution in the common law sense implies restoring only that which the defendant gained in the transaction.

Other cases cited by plaintiff do not challenge this proposition. At least two cases relied upon are inapposite because they affirm civil penalties in favor of the state (*People v. Cappuccio* (1988) 204 Cal.App.3d 750; *People v. Morse* (1993) 21 Cal.App.4th 259). In these cases, restitution was not even an issue.

The case *People ex rel. Bill Lockyer v. Fremont Life Insurance Company* (2003) 104 Cal.App.4th 508, 532 also dealt with a civil penalty. However, the court also evaluated the restitution order under Business and Professions Code section 17203. In that case, the court found that an annuity policy was misleading, based in part on its findings that the "premium charge" was "unusual" and "not conspicuously set forth" in the policy or in the sales brochures. In a restitution order, the court ordered defendant to make an offer of restitution to each nonsettling California consumer (or beneficiary under the terms of the policy), to restore the premium charge. Appellant argued that the order did not restore the status quo but altered the "lawful terms of the annuity contract" because the premium charge itself was lawful. The court rejected this assertion, reasoning that while the premium charge was lawful in itself, the annuity policy was misleading as a whole because of the premium charge term. Thus, the court found that the premium charge was unlawful under the UCL. The court found that the restoration of the premium charge thus restored the status quo. This case is not helpful to plaintiff because nothing

indicates that defendant had to pay more than what it unlawfully gained (except the civil penalty).

Finally, plaintiff relies on *Rosales v. Citibank, Federal Savings Bank* (N.D. Cal. 2001) 133 F.Supp.2d 1177. In *Rosales*, the plaintiff claimed that he lost money from his bank account due to an unauthorized withdrawal by someone else. Citibank argued that they did not have to restore anything to plaintiff because Citibank did not take anything from plaintiff. However, Citibank did not reimburse plaintiff as required by law. The court found that Citibank thus withheld money belonging to plaintiff and this could be "restored" to plaintiff.

In conclusion, either under a theory of restitution or "disgorgement," the plaintiff class is entitled to "all money obtained" by means of the unlawful practice. The money "obtained" here is received by the defendant from the retailers less the amount paid by defendant to the manufacturer. Anything more would constitute an award of damages (i.e., making the plaintiff "whole.")

The testimony of both damage experts is that the defendant received $16,538,328 from retailers or direct sales. Dr. Kennedy computed the cost of goods at $4,001,508, leaving a net to defendant of $12,536, 820. (Exhibit 2279.)

There was testimony that the sales to GNC were understated by 25,000 units which would increase the dollars received by approximately $400,000. There was also testimony that defendant paid rebates of approximately one dollar per bottle to salespeople at GNC and there were other expenses. None of this is documented and the Court is not allowing any of these items. See Evidence Code section 412.

The largest deduction claimed by defendant is the three to five million dollars of advertising that defendant estimates it spent in California. It would be inequitable to allow the defendant to reduce the amount of restitution by the amount spent on the misleading advertisements. Therefore, the Court is exercising its broad equitable power and is not going to allow the restitutionary amount to be reduced by the advertising expenses.

Finally, since the Court has found virtually all of the advertisements to be misleading, in addition to the first three labels, there should be no reduction for "proportionality," assuming there was authority to support a proportionate reduction. The purchasers of Xenadrine RFA-1 were misled

throughout the class period and there is no justification to reduce the amount of restitution from the total amount received by defendant of $12,536,820.

Therefore, defendant is ordered to pay TWELVE MILLION FIVE HUNDRED THIRTY-SIX THOUSAND EIGHT HUNDRED TWENTY and 00/100 DOLLARS ($12,536,820.00) into a fund to be distributed as ordered by this Court.

C. Injunctive Relief

Defendant argues that since it is no longer selling Xenadrine RFA-1 in California, there cannot be any injunctive relief. This argument is not supported by the statute, Business and Professions Code section 17203, which says: "any person who engages, has engaged, or proposes to engage in unfair competition" may be enjoined. (Emphasis Added.) See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 570.

Therefore, Cytodyne, its officers, principals, agents, servants, employees, successors, assigns, and all those in active concert or participation with them are enjoined and restrained from disseminating or causing to be disseminated, through any advertisement, label, commercial or other promotional activity, any advertising claim which includes representations identical or similar to those claims found to be false or misleading, either directly or by necessary implication, whether material or not.

ATTORNEY'S FEES

Plaintiff's counsel may apply for attorney's fees.

PRODCEDURE

If a Statement of Decision is requested, the Court will prepare such Statement. This Tentative Decision shall become the Statement of Decision unless within 10 days either party specifies controverted issues or makes proposals not covered by this Tentative Decision. The Court also requests each side to submit proposals on how the restitution fund is to be distributed.

Dated: May ____, 2003

_____
RONALD L. STYN
Judge of the Superior Court